ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 2055

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	WC Docket No. 02-77
	)	
Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act	)	

REPLY COMMENTS OF QWEST CORPORATION IN SUPPORT OF PETITION FOR DECLARATORY RULING

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To: The Commission

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Qwest Corporation hereby files these reply comments in support of its petition for declaratory ruling in the above proceeding.

INTRODUCTION AND SUMMARY

The parties opposing Qwest's petition misconceive what this proceeding is about, so a word of clarification is appropriate at the outset. Qwest's petition does *not* ask whether, by serving as an ISP's billing and marketing agent, an ILEC has in some sense become a "co-retailer" of the *bundled DSL information service* that the ISP sells to end users, such that the ILEC must provide it (or some component of it) to CLECs for resale at wholesale rates. If that were the question presented here, this would be a very different proceeding, because the answer might indeed turn on the kinds of interactions the ILEC has with the end-user consumers of the bundled service. Nevertheless, as discussed in Part II below, Qwest would still probably prevail in that hypothetical dispute on the present facts, because MSN has privity of contract and controls all communication with the end-user customers and Qwest does not.

The Commission need not reach that issue here, however, to resolve the narrow, purely legal question posed in Qwest's petition. Even if Qwest could be characterized as a "co-retailer" of this bundled DSL information service along with MSN (which it cannot be), the service would still fall outside the scope of section 251(c)(4) for the independent reason that it is not a – and contains no – "telecommunications service." *See* Qwest Corporation Petition for Declaratory Ruling, filed on April 3, 2002, at 3, 12-13 ("Qwest Petition"). The Commission recently reached that tentative conclusion in the *Wireline Broadband* proceeding,[1/] two years after it issued the *AOL Bulk Services Order*,[2/] which first held that an ILEC's provision of bulk DSL transmission services to ISPs is a "wholesale," rather than "retail," service. That chronology explains why, at first blush, several passages in the *AOL Bulk Services Order* can be read to attribute legal significance to the nature of an ILEC's relationship with the end-user consumers of these information services: in 1999, the possibility remained that resale obligations would apply to an ILEC retailer of such services. That possibility no longer exists, unless the Commission were to reverse its tentative (and statutorily compelled) conclusion in the *Wireline Broadband* proceeding.

The only remaining question is whether an ILEC's interactions with these end users somehow convert the ILEC's provision of a *different* service (bulk DSL transmission capacity) to a *different* customer (an ISP) from a wholesale service into a "retail" service subject to section 251(c)(4). The answer is no, and indeed any contrary answer would defy logic.

1/ *See* Notice of Proposed Rulemaking, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019, ¶¶ 24-25 (2002) ("*Wireline Broadband NPRM*").

2/ Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd. 19237 (1999) ("*AOL Bulk Services Order*"), *aff'd*, *Ass'n of Communications Enters. v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

It is undisputed that Qwest (or any other ILEC) is free to provide end users, "at retail," a bundled DSL/ISP information service of its own – *i.e.*, a service in which Qwest, rather than an unaffiliated ISP, provides end users with Internet access as well as the underlying transmission capacity. And it is similarly undisputed that, under the tentative conclusion of the *Wireline Broadband NPRM*, Qwest's provision of that service "at retail" would trigger no resale obligations under section 251(c)(4). To be sure, under the *Computer II/III* regime, Qwest would be obligated to make the bulk transmission component of that retail information service available to competing ISPs on a wholesale basis.[3/] But the *AOL Bulk Services Order* would indisputably exempt that service from the resale obligation of section 251(c)(4) as well, because Qwest would not be selling the competing ISPs any service "at retail."

These facts are dispositive here. If Qwest incurs no resale obligations when it provides bundled DSL/ISP services "at retail" to end users, it would make no sense to subject Qwest to those very obligations when it chooses *not* to provide these bundled information services by itself and instead leaves both the ISP functions *and the primary end-user relationship* to an unaffiliated ISP. For all the ink that has been spilled, the legal question presented in Qwest's petition is as simple, and as purely legal, as that.

[3/] *See Wireline Broadband NPRM*, ¶ 40; Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* 16 FCC Rcd. 7418, ¶ 4 (2001) ("[t]he Commission has interpreted [the relevant *Computer II*] requirement to mean that carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers") (quotation omitted); *see also* Memorandum Opinion and Order, *In the Matter of Joint Application by SBC Communications Inc., etc., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd. 20719 (2001), Separate Statement of Commissioner Kathleen Q. Abernathy, at 7-8. As Qwest has previously explained, the resale obligations of section 251(c)(4) plainly do apply to the *non*-volume, stand-alone DSL transmission services that Qwest provides directly to *end users* under completely different tariff provisions, because those are in fact "telecommunications services" provided "at retail."

Finally, there is no merit to the suggestion of the Minnesota Department of Commerce ("DOC") that the Commission "dismiss" this petition so that the DOC may proceed unfettered by the Commission's views on federal law as it continues its factual "investigation" into matters that have no logical relevance to this petition. The Commission should similarly cut through the other distractions that several commenters seek to interpose between the petition and resolution of the legal question it poses. For example, to answer that legal question, the Commission need not address the various (groundless) allegations that Qwest has discriminated against non-MSN ISPs,[4/] because this petition deals only with the scope of section 251(c)(4), and that provision in turn addresses only the scope of an ILEC's obligations to *CLECs*. Nor need the Commission resolve whether, as a few commenters claim, Qwest has somehow violated the filed tariff doctrine or section 271(a)'s prohibition on a Bell company's provision of interLATA services. Those allegations are as irrelevant as they are substantively groundless. Qwest filed this petition to obtain clarification on a narrow issue of federal law relating to its resale obligations under section 251(c)(4). The petition is not an open invitation for Qwest's competitors to air unrelated grievances properly addressed, if at all, in other proceedings before this Commission.

ARGUMENT

I. Because ILECs do not trigger the resale obligations of section 251(c)(4) by offering their own bundled DSL/ISP services to end users, it follows *a fortiori* that ILECs do not trigger those obligations when they agree to serve as marketing and billing agents for ISPs that provide those services under their own name.

To the limited extent that the parties opposing Qwest's position address the legal issue presented here at all, they engage in a classic shell game. Their advocacy focuses almost entirely

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4/ *See* Opposition of AT&T Corp. to Qwest Corporation's Petition for Declaratory Ruling, filed in WC Docket No. 02-77 on May 15, 2002, at 4, 16-17 ("AT&T Comments"); Comments of Minnesota Department of Commerce, filed in WC Docket No. 02-77 on May 14, 2002, at 6-8 ("DOC Comments"); Comments of New Edge Network, Inc. D/B/A/ New Edge Networks, filed in WC Docket No. 02-77 on May 15, 2002, at 2, 5-7 ("New Edge Comments").

on the degree of Qwest's interactions with the end-user consumers of MSN's "MSN Broadband" product.[5/] But Qwest's opponents do not explain – as indeed they cannot – how any interactions Qwest may have with MSN's *customers* could transform the bulk DSL transmission service Qwest sells *to MSN* into a "retail" service. Indeed, the logical upshot of their position is that, by interacting with those end users, Qwest (either in addition to or instead of MSN) has become a retail provider of the bundled DSL/ISP information service. As the Commission has tentatively concluded in the *Wireline Broadband* proceeding, however, Qwest's provision of that information service "at retail" would trigger no resale obligations under section 251(c)(4) *even if MSN played no role in the provision of that service at all.* And if Qwest's provision of such services would not trigger resale obligations in the absence of any role for MSN, then *a fortiori* it could not trigger them where MSN retains the primary relationship with those end users.

The legal background for that conclusion is straightforward. As the Act provides, and as the Commission has long observed, a service must have three characteristics before an ILEC must make it available to CLECs for resale at cost-avoided rates under section 251(c)(4). "The category of services subject to the provisions of section 251(c)(4) is determined by whether those services are: (1) telecommunications services that an incumbent LEC provides (2) at retail, and (3) to subscribers who are not telecommunications carriers."[6/] Thus, to justify any application of section 251(c)(4) here, the opposition must show that Qwest provides, *in a single offering*, (1) a telecommunications service (2) at retail. This it cannot do.

5/ *See* AT&T Comments at 3, 6-10, 12-15; DOC Comments at 3-6; Opposition of the Association of Communications Enterprises, filed in WC Docket No. 02-77 on May 15, 2002, at 9; New Edge Comments at 6.

6/ Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, ¶ 275 (rel. May 15, 2002).

There are two potential offerings the Commission could consider here. *First*, there is the volume DSL transport offering contained in Qwest First Revised Tariff F.C.C. No. 1, § 8.4.4, effective Aug. 7, 2001 ("Tariff 8.4.4"), which has been purchased by several unaffiliated ISPs. Even if an ILEC's provision of bulk DSL services to ISPs must be treated as a common carriage telecommunications service, a point that Qwest has elsewhere disputed,[7] the service is clearly not offered "at retail," and thus falls outside the ambit of section 251(c)(4), as the Commission has squarely determined in the *AOL Bulk Services Order* and codified in 47 C.F.R. § 51.605(c) ("Rule 605(c)"). *Second*, there is "MSN Broadband," which is admittedly a retail service purchased by end users. But even if Qwest could be deemed a co-"retailer" of this service along with MSN, which it cannot be (*see infra* Part II), its role in providing that service still would not trigger section 251(c)(4)'s resale requirements, because the bundled DSL/ISP service that is "MSN Broadband" is an "information service," not a "telecommunications service."

It is only by conflating these two services, and mixing and matching from each, that the commenters opposing Qwest's petition can cobble together a "service" that supposedly satisfies section 251(c)(4)'s requirements. *See* AT&T Comments at 3, 15. For example, AT&T takes the "retail" nature of the MSN Broadband service sold *to consumers*, adds the (asserted) "telecommunications service" classification of the bulk DSL service sold *to MSN* under Qwest's

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[7] In the *Wireline Broadband* proceeding, Qwest has argued that an ILEC should be free to offer volume broadband transmission services to ISPs on a case-by-case "private carriage" basis, just as this Commission recently permitted cable companies to do. *See* Comments of Qwest Communications International Inc., filed in CC Docket No. 02-33 on May 3, 2002, at 12-21 ("Qwest Wireline Broadband Comments"); *see also* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Internet over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, ¶ 54 (rel. Mar. 15, 2002) (finding that, to the extent cable operators provide broadband "telecommunications" to unaffiliated ISPs, they may do so as "private carrier[s]," not as "common carrier[s]" subject to regulation under Title II).

volume tariff, smashes these halves of two separate relationships together, and then cites this freakish amalgam as the basis for saddling Qwest with resale obligations under section 251(c)(4). *See* AT&T Comments at 3, 15. Once this shell game is exposed for what it is, AT&T's argument collapses of its own weight.

Moreover, because the Commission has now tentatively concluded that a bundled DSL/ISP service is an information service without a telecommunications service component, *Wireline Broadband NPRM* at ¶¶ 24-25, and because such a service thus falls plainly outside the ambit of section 251(c)(4) *for that reason alone*, the details of Qwest's agency relationship with MSN are irrelevant to this proceeding.[8/] If there were any doubt on this point, the Commission dispelled it in the categorical language it chose two years ago for the governing regulation: "advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers." 47 C.F.R. § 51.605(c) . That language makes no exception for cases in which an ILEC agrees to act as a marketing and billing agent for an ISP. The parties opposing the petition rely heavily on paragraphs 15 and 17 of the *AOL Bulk Services Order*, which, they claim, require a fact-specific inquiry into the details of the ILEC's interaction with end users in such circumstances. To the limited extent that these passages could ever have been construed as support for conducting such an inquiry, they have been overtaken by the intervening authority of the *Wireline Broadband NPRM*. When the

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8/ Were the Commission to reverse course on its tentative conclusion that bundled DSL/ISP offerings are information services without any "telecommunications service" component, the place to do so would obviously be the *Wireline Broadband* proceeding, not this one. As Qwest has explained in that proceeding, however, that tentative conclusion is not an open policy choice; it is a statutory mandate. *See* Qwest Wireline Broadband Comments at 4-8.

Commission issued the *AOL Bulk Services Order* in 1999, it had not yet ruled that section 251(c)(4) is inapplicable to an ILEC's involvement in the provision of bundled information services to end users "at retail." Two and a half years later, now that the Commission has (tentatively) adopted that position, the degree of that ILEC involvement is completely irrelevant for present purposes.

Finally, it is necessary to put to rest AT&T's absurd claim that the rule Qwest seeks here would produce "widespread and fact intensive litigation." AT&T Comments at 10. In fact, the rule Qwest advocates is the same *non*-fact-intensive, categorical rule already embodied in the plain language of Rule 605(c). It is AT&T that invites the Commission to endorse an amorphous exception to Rule 605(c) for any ILEC-ISP relationship in which the "ILEC performs significant marketing, billing, and collection activities" for the ISP (AT&T Comments at 8), whatever that means. In the interest of maintaining clear, consistent and manageable rules, the Commission should decline the invitation to expand the regulatory sphere to engulf those currently unregulated activities.

II. Even if an ILEC's interactions with end-user consumers of a bundled information service could trigger resale obligations under section 251(c)(4), Qwest's limited relationship with the end-user consumers of "MSN Broadband" service would be insufficient to make Qwest, rather than MSN, the retail provider of that service.

The analysis up to this point provides a complete answer to the question posed in Qwest's petition: Just as Qwest's *own* provision of a bundled DSL/ISP information service "at retail" would trigger no resale obligations under section 251(c)(4), neither does Qwest trigger those obligations when it acts as a marketing and billing agent for an independent ISP that offers that service under its own name. In any event, even if the Commission were to reverse its tentative conclusion in the *Wireline Broadband* proceeding, section 251(c)(4) would still be inapplicable

here, because Qwest is not in fact the retail provider of the "MSN Broadband" service that MSN sells to end users: MSN is.

As an initial matter, although several commenters appear to have lost sight of this point, regulation should not be a *default* reaction to any new business or business model; rather, it should be a fallback position to be adopted only in the event of a market failure. In this case, although Qwest is a common carrier of telecommunications services, it is *not* an advertising common carrier or a collections common carrier. Qwest performs certain non-common carriage services for MSN under contract, for which Qwest is paid a fee, over and above the rates it receives from MSN for the sale of its bulk DSL transmission service under Tariff 8.4.4. This extra economic activity between Qwest and MSN is a *good* thing, and the reflexive desire of the DOC (which has no telecommunications expertise and whose apparent instincts contradict the deregulatory policies of both Congress and the Commission) to regulate any and all commercial activities of the phone company is inappropriate.

Moreover, as Qwest made clear in its petition, relying on facts that remain unchallenged, its interactions with MSN's customers are sharply circumscribed, and occur only pursuant to authority delegated to Qwest by MSN to act as MSN's agent. *See* Qwest Petition at 5-6; Affidavit of Vice President Steven K. Starliper, Exhibit A to Qwest Petition, filed April 3, 2002, at ¶¶ 8-14 ("Starliper Affidavit"). That agency relationship leaves MSN's retail customers as MSN's alone. Starliper Affidavit at ¶ 13. In particular, MSN bears the entire risk of non-payment for the bundled DSL/ISP service by end-user customers, and, as Sprint ably explains,

that fact is dispositive.[9/] Starliper Affidavit at ¶¶ 12, 13. In addition, although Qwest performs certain sales, billing and collection services at MSN's behest, MSN retains all customer information and data, supplies the customer premises equipment, assigns e-mail addresses, deals with customers on repair issues, and takes customer disconnect orders. *Id.* at ¶¶ 9, 11-14. MSN also has primary responsibility for resolving customer billing issues. *Id.* at ¶ 12. And Qwest performs advertising and sales functions for a fee as MSN's agent, much as any other sales and marketing agent would do. Thus, as Qwest has previously explained, it would be no more proper to find that Qwest is "providing" MSN Broadband here on the basis of the contract services Qwest renders to MSN than it would be to find that Qwest "provides" long distance services when serving, as almost every ILEC now does, as a billing agent for unaffiliated IXCs. *See* Qwest Petition at 11.

In sum, "MSN Broadband" is an MSN product, not a Qwest product. Again, however, even if the Commission were to conclude otherwise, that bundled DSL/ISP service still would not fall within the ambit of section 251(c)(4) because it is an *information* service, immune from section 251(c)(4)'s requirements for that wholly independent reason.

9/ *See* Comments of Sprint Corporation, filed in WC Docket No. 02-77 on May 15, 2002, at 3 n.7 (noting that in *Intermountain Microwave*, 12 F.C.C.2d 559 (1963), "the Commission acknowledged that the bearing of financial risk and reward is one of the critical indicia in determining when an entity has de facto control of a[n] FCC license.").

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission issue a declaratory ruling that Rule 605(c) applies to an incumbent LEC that serves as a billing, collection, and marketing agent for an unaffiliated ISP.

Respectfully submitted,

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May 30, 2002

CERTIFICATE OF SERVICE

I, John Meehan, do hereby certify that on this 30th day of May, 2002, I caused true and correct copies of the foregoing Reply Comments of Qwest Corporation to be served by courier, or by first class mail, postage prepaid, upon the following parties:

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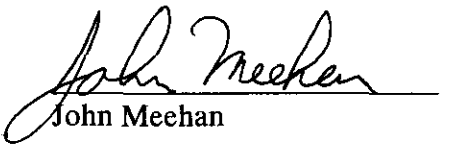

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